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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JOHN BRUMBAUGH,

Plaintiff and Appellant,

v.

CITY OF TORRANCE et al.,

Defendants and Respondents.

B210529

(Los Angeles County
Super. Ct. No. BS097255)

APPEAL from a judgment of the Superior Court of Los Angeles County.
James C. Chalfant, Judge. Appeal dismissed by opinion.

Lackie, Dammeier & McGill, Michael A. McGill, Rana M. Kavar and Jessica L. Kirschbraun for Plaintiff and Appellant.

Liebert Cassidy Whitmore, J. Scott Tiedemann and Jennifer K. Palagi for
Defendants and Respondents.

* * * * *

Plaintiff and appellant John Brumbaugh appeals from the denial of his application for a contempt order. He contended that defendants and respondents the City of Torrance, Leroy Jackson and James Herron (sometimes collectively defendants) violated the trial court's June 15, 2007 judgment by failing to hold an evidentiary hearing before declining to reinstate him.

We dismiss the appeal. Appellant has appealed from a nonappealable order.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was formerly employed as a police officer with the City of Torrance (City). In February 1998, both a criminal investigation and an internal affairs investigation ensued as a result of appellant's girlfriend reporting an incident of domestic violence. Following the criminal investigation, the Office of the District Attorney of Los Angeles County (District Attorney) filed a seven-count complaint, and appellant was arrested on February 24, 1998. In August 1998, a jury returned a verdict of guilty and convicted appellant on two felony counts of dissuading a witness and one misdemeanor count of domestic battery.

According to the City Municipal Code, a department head, with the city manager's approval, may discharge an employee for, among other things, misconduct or the failure to observe the City's rules and regulations. On September 3, 1998, the City Chief of Police wrote to appellant, informing him that the City intended to discharge him for misconduct. On November 2, 1998, the City notified appellant that, following an administrative hearing, it had determined to uphold the police department's termination recommendation. Appellant requested review of the decision.

In January 1999, the City's Civil Service Commission (Commission) held a hearing and thereafter issued findings of fact and conclusions of law determining that the City properly exercised its discretion in imposing discharge as a disciplinary action against appellant. Appellant appealed, and the City Council upheld the Commission's decision.

Several years later, in January 2005, the United States District Court for the Central District of California granted appellant's petition for writ of habeas corpus on the basis of prejudicial instructional error and ordered that appellant be retried within 60 days or discharged from any adverse consequences of his conviction. The District Attorney determined not to retry appellant. The Commission declined to reopen the matter of appellant's termination by reason of his conviction being overturned, stating that it lacked authority to reopen a final decision of the City.

On June 3, 2005, appellant filed a verified petition for writ of mandate against the City and the Commission seeking the issuance of a peremptory writ compelling the City and the Commission to set aside the decision to uphold his termination and provide him with an administrative appeal; to reinstate him to his previous position; to provide him with backpay, benefits and interest; and to remove references to the termination from his personnel file. He filed an amended petition for writ of mandate in August 2005 which raised the same claims as in the original petition. City Manager Leroy Jackson and City Chief of Police James Herron intervened in the matter.

Following a June 1, 2007 hearing, the trial court issued a judgment denying appellant's petition pursuant to Code of Civil Procedure section 1085 to the extent it sought reinstatement and pursuant to Code of Civil Procedure section 1094.5, as the decision to terminate was not an abuse of discretion. However, it granted the petition pursuant to Code of Civil Procedure section 1085 to compel a hearing "as set forth in *Tuffli v. [Governing Board (1994)]* 30 Cal.App.4th 1398, to determine the status of Petitioner's revived interest in employment with the City of Torrance in light of the reversal of Petitioner's felony conviction."¹

Appellant served the City with a copy of the judgment on July 16, 2007. On September 25, 2007, in accordance with the judgment, the City Council conducted a hearing. After reviewing the record and hearing argument from counsel, the City Council

¹ On September 16, 2008, we issued an unpublished opinion in *John Brumbaugh v. City of Torrance et al.*, case No. B202117, affirming the trial court's denial of appellant's motion for attorney fees on the petition for writ of mandate.

ordered the police department, as soon as practicable, to conduct a full background check of appellant as described in Government Code section 1031 and related regulations. The background check was to cover the nine-year period since appellant's termination. The City Council further indicated that it would consider the results of the background check in completing its determination of the status of appellant's revived interest in employment.

In January 2008, appellant filed a motion to enforce the judgment on the petition for writ of mandate, seeking an order that defendants complete their background investigation without the necessity of him signing any releases or waivers and without his undergoing a physical and psychological examination. Defendants opposed the motion. Following a February 15, 2008 hearing, the trial court denied the motion, directing appellant to provide the records sought and to submit to an examination by defendants' doctor. It reasoned that "[a]lthough Brumbaugh was once a City police officer, there was a nine-year period during which he was not so employed. The City has the right to determine whether anything happened during those nine years that would disqualify him from serving as a police officer."

On April 18, 2008, Laura Lohnes, the acting civil service manager for the City, informed appellant that he would be provided with the results of the City's investigation by April 29, 2008. In addition, she outlined a briefing schedule and set forth the argument schedule that the City staff had adopted for the hearing. Appellant responded to her, objecting to the proposed procedure and indicating that the hearing should be one in which witnesses testify and evidence is presented. In turn, Lohnes responded that the hearing was a continuation of the initial September 2007 hearing and was for the purpose of the results of the background investigation to be presented to the City Council to enable it to resume its determination of appellant's revived interest in employment. The proposed briefing schedule afforded both parties the opportunity to outline their positions with respect to the background check.

On April 28, 2008, the police department submitted the results of its extensive background investigation and, on the basis of those results, recommended that appellant not be reinstated.

Appellant sought ex parte relief on May 1, 2008, asserting that the hearing procedure proposed by the City failed to comport with due process. The trial court denied the application. Thereafter, the parties submitted hearing briefs. Appellant attached letters, declarations and other documentary evidence to his brief. The City Council conducted a hearing on May 13, 2008, during which time each party was permitted 25 minutes to argue. At the conclusion of the hearing, the City Council adopted the findings and recommendations in the police department's report and determined, by unanimous vote, that the City had legal cause for declining to reinstate appellant's employment.

On May 23, 2008, appellant filed an application for an order to show cause re contempt on the ground that the hearing process violated the judgment on the petition for writ of mandate. Defendants opposed, asserting that they complied with all applicable procedures in conducting the hearing and requiring a background investigation. The trial court heard the matter on June 23, 2008. It found no basis for a finding of contempt, given that the City's background investigation was in compliance with the initial judgment and the City was entitled to investigate as a threshold matter whether appellant was suitable for reinstatement.

This appeal followed.²

DISCUSSION

Though defendants have not moved to dismiss the appeal, they argue in their respondents' brief that appellant has appealed from a nonappealable order.

² At defendants' request, we have taken judicial notice of a petition for writ of mandate subsequently filed by appellant in the Superior Court of Los Angeles County, case No. BS116891, which also challenges the results of the City Council's decision not to reinstate appellant.

“Nevertheless, ‘since the question of appealability goes to our jurisdiction, we are dutybound to consider it on our own motion.’” (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 436, quoting *Olson v. Cory* (1983) 35 Cal.3d 390, 398.)

The general rules regarding appealability are well established. “In California, the right to appeal is governed solely by statute and, except as provided by the Legislature, the appellate courts have no jurisdiction to entertain appeals. An appealable judgment or order is essential to appellate jurisdiction, and the court, on its own motion, must dismiss an appeal from a nonappealable order. [Citation.]” (*Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 645; accord, *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696 [“[a] reviewing court has jurisdiction over a direct appeal only when there is (1) an appealable order or (2) an appealable judgment”].)

It is equally well established that orders and judgments made in cases of contempt are not appealable, whether contempt is found or not. (Code Civ. Proc., §§ 904.1, subd. (a)(1) & 1222; *Moffat v. Moffat* (1980) 27 Cal.3d 645, 656; *John Breuner Co. v. Bryant* (1951) 36 Cal.2d 877, 878.) Appellant’s argument that the order denying his order to show cause re contempt is an appealable order after judgment finds no support in the statutory scheme. Code of Civil Procedure section 904.1, subdivision (a) provides in part: “An appeal, other than in a limited civil case, may be taken from any of the following: [¶] (1) From a judgment, except (A) an interlocutory judgment, other than as provided in paragraphs (8), (9), and (11), or (B) a judgment of contempt that is made final and conclusive by Section 1222. [¶] (2) From an order made after a judgment made appealable by paragraph (1).” In turn, Code of Civil Procedure section 1222 provides: “The judgment or orders of the court or judge, made in cases of contempt, are final and conclusive.” According to these provisions, “a contempt order is nonappealable [citations].” (*Mitchell v. Superior Court* (1972) 28 Cal.App.3d 759, 764.) Rather, the order may be reviewed only by a petition for writ of certiorari, or in appropriate cases, a petition for writ of habeas corpus. (*John Breuner Co. v. Bryant, supra*, at p. 878; accord, *People v. Gonzalez* (1996) 12 Cal.4th 804, 816 [review of contempt order is by extraordinary writ].)

Because a contempt order is nonappealable, an appeal from such an order is properly dismissed. (*John Breuner Co. v. Bryant*, *supra*, 36 Cal.2d at p. 878; see also *Albertson v. Warriner* (1962) 199 Cal.App.2d 560, 564–565 [dismissal of appeal from order dismissing contempt proceedings]; *Berry v. Berry* (1956) 140 Cal.App.2d 50, 60 [dismissal of appeal from order adjudging the plaintiff not to be in contempt].) Here, appellant appealed only from the order denying his application for an order to show cause re contempt. Because his appeal is from a nonappealable order, it must be dismissed.

DISPOSITION

The appeal is dismissed. Defendants are awarded their costs on appeal.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST